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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

TEXTILE WORKERS UNION OF AMERICA,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN, INC., DEERING MILLIKEN & COMPANY, INC., and NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY; DEERING MILLIKEN, INC.; DEERING MILLIKEN AND COMPANY; and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR DEERING MILLIKEN, INC.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR DEERING MILLIKEN, INC.

Questions Presented

Darlington Manufacturing Company (hereinafter "Darlington"), a textile company owning one mill, was confronted in mid-1956 with continued marginal earnings and a projected operating loss. It was owned 41 percent by

Deering Milliken, Inc.,[1] 28 percent by certain members of the Milliken family group, and the remaining 31 percent by miscellaneous public shareholders. Following a representation election, which was won by the Textile Workers Union of America (hereinafter the "union"), Darlington dissolved its corporate existence and completely liquidated its affairs. The National Labor Relations Board (hereinafter the "Board") found that this action would not have been taken "but for the protected organizational activities" of the employees (R. 8).[2]

The questions presented are whether in these circumstances (1) Darlington's complete and final withdrawal from business was a violation of the National Labor Relations Act and, (2) if not, whether Darlington's withdrawal from business, even though final and complete, was a violation of the Act because of relationships alleged to exist between Darlington, on the one hand, and Deering Milliken as well as certain other corporations, on the other.[3] The first question will be argued by Darlington's counsel.

STATEMENT

The acts that the Board held constituted unfair labor practices were committed solely by Darlington. Deering Milliken was held responsible to remedy Darlington's acts,

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[1]In this brief "Deering Milliken" means Deering, Milliken and Co., Inc. which, in June, 1960, was merged into the Cotwool Manufacturing Corporation, the name of which was then changed to "Deering Milliken, Inc." See the trial examiner's Second Supplemental Intermediate Report, esp. at R. 235-36.

[2]Reference to the materials involved in these cases will be made as follows: references to the record by page (e.g. R. 8); references to the briefs by party (if necessary) and page (e.g. NLRB Br. 48 or p. 48); references to the transcript of the hearings before the trial examiner by transcript page (e.g. Tr. 3521).

[3]The union raises two further questions. These will be briefly discussed in Point III, at pp. 43 to 45, *infra*.

not because of any participation therein, but on the theory that the relationships between the two companies were such that they, together with others, constituted a "single employer".

Although the court below did not review the conclusions and findings of the Board with respect to these relationships, a statement of the relevant facts is essential to a correct understanding of the questions of law presented. Hence, we set forth below a statement of these facts that is more precise than the statements found in the briefs of petitioners.

A. Ownership of Darlington Stock

Deering Milliken has never owned a majority interest in Darlington. Although Darlington was organized in 1883, it was not until 1937 that Deering Milliken acquired a single share of Darlington stock. At that time, during Darlington's reorganization under Section 77B of the Bankruptcy Act and as Darlington's largest creditor, Deering Milliken was issued Darlington stock in exchange for its debt (R. 391). According to the record, at the time this case arose Deering Milliken still held the 41.4% it had acquired in 1937.

Roger Milliken, with the three other members of his immediate family, owned 6.4% of Darlington's shares (R. 1310). He also owned, with members of his immediate family, about 20% of the shares of Deering Milliken (R. 438). A larger group, described as the "Milliken family" and defined in the record (R. 1308) as the lineal descendants of Seth Milliken, owned stock in Deering Milliken and also in certain other textile companies. The "Milliken family", however, was not the small tightly-knit group of two or three persons usually found in the single employer cases. In 1959, it consisted of

one estate and 27 individuals[4] and since then has more than doubled.

Darlington had a substantial bloc of "outside" stockholders, i.e., persons not connected with the Milliken family or any of the other corporations. These persons numbered over 200 (R. 432-33) and owned 46,000 or 31% (R. 1310) of Darlington's shares. Three-fourths of these stockholders were represented at the October 1956 meeting at which Darlington's liquidation was voted (R. 1292-1300). 134,911 shares out of a total of 138,685 voted were voted in favor of the resolution to liquidate (R. 1265), meaning that, at the minimum, 92% of the "outside" stock approved the resolution. The largest outside stockholder, Henry Simpson, who owned directly or beneficially 20,000 shares (R. 1214), spoke in favor of the liquidation motion (R. 434). Simpson's representative on Darlington's board, Lyles, had previously voted for liquidation at the directors' meeting in September.

This was not a case in which the Milliken interests forced dissolution of the mill over the objections of the substantial minority stockholder group; the latter almost unanimously supported the decision.

The Board reversed the trial examiner and held (R. 23) that seventeen other mill corporations in which members of the Milliken family owned direct or indirect interests were also part of a "single employer" unit. These mills are frequently referred to in the record and will be here as the "Deering Milliken mills", which means that all of them used Deering Milliken as their factor and sales agent. The

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[4]Roger Milliken, in an affidavit of February 5, 1959, filed in support of a motion before the trial examiner to dismiss the complaint against him, acknowledged the accuracy of the complaint's allegations that the lineal descendants of Seth Milliken owned a majority of Deering Milliken and Cotwool stock and added (¶ 11):

> "This group is comprised of one estate and 27 individuals, of whom I am but one. Moreover, the interest of three of the great great grandchildren, who are minors, is represented by an individual and a corporate bank trustee."

Board found (R. 23-24) that while the Milliken family owned, directly or indirectly, a majority interest in each of these mills, outside stockholders owned about 45% of the Hartsville Cotton Mill (R. 1309), the mill geographically closest to Darlington, and from 12% to 44% of the "affiliated" corporations (R. 1309-10). Shares of stock in each of the cotton mills were regularly quoted and sold by securities dealers in the Carolinas (R. 1310).

B. Deering Milliken's Past and Present Role in this Case

In October and November, 1956, following public announcement of the directors' recommendation that Darlington be dissolved, the union filed a charge against "Darlington Manufacturing Company, Roger Milliken, President, and Deering Milliken & Company, Inc." (R. 1241). However, the Regional Director refused to issue a complaint against Roger Milliken and Deering Milliken. Consequently, the complaint issued only against Darlington. Further union efforts at that time to draw Deering Milliken into the case by deposition, by subpoena, or by complaint also did not succeed (R. 49-50). At the 1957 hearings on the complaint against Darlington, the union made an offer of proof in which it asserted, *inter alia*, that Darlington was a unit in a textile chain and that, far from having permanently gone out of business, Darlington was only another "runaway plant" (R. 296-302), whose production was transferred to and absorbed by other Deering Milliken mills (R. 302). The proof was excluded and Darlington was the only respondent covered by the first intermediate report (R. 43). The examiner found that Darlington had violated the Act by closing its only mill but, inasmuch as it had not been shown that Darlington would have continued to operate its mill for any definite additional period, he concluded that *any* financial assessment would be punitive (R. 45).

When the case came before the Board in 1957 on exceptions by all parties to this report, the Board majority ordered a remand for the taking of evidence as to the union's claim that Darlington's operations and labor relations were controlled by Deering Milliken. The two dissenters objected that this evidence need not be considered until the Board first decided whether a violation by Darlington had occurred (119 N. L. R. B. 1069).

Darlington's and Deering Milliken's files were then made available to Board and union counsel. From thousands and thousands of documents, 2600 items were selected for further study and analysis (R. 511), and General Counsel introduced about 400 of these in evidence. From these the trial examiner selected about 175 for discussion, on the basis of what he considered General Counsel's "stronger" suggestions of single employer status (*e.g.*, R. 165).

Under this approach, evidence tending to disprove single employer status was either ignored or minimized.[5] Consequently, the examiner's report is not a comprehensive examination of how Darlington's business was actually run, but only a critique of certain documents and testimony selected by the Board's General Counsel to support his

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[5]Thus, respondents were asked to produce handbooks issued to employees at Darlington and some of the other Deering Milliken mills. These proved to be different in format and content. They contained no reference to Deering Milliken (except for casual identification as "our selling agent," which "sells the goods we produce"), and an organization chart did not even refer to the position of president (then filled by Roger Milliken) but described the treasurer or vice president as the head of each company (R. 1237-38). Yet the trial examiner, although reporting on the question of external control of Darlington's labor relations, gave only scant attention to the absence of any statement to the employees about a connection with the Deering Milliken "chain," and instead simply noted that "the dissimilarities [among these handbooks] are significant" (R. 133-34).

argument that Darlington was controlled by Deering Milliken. A more balanced presentation would reveal more clearly the insubstantial basis for the Board majority's reversal of the trial examiner.

The purpose for which these documents and the testimony was offered was, by consent of all parties, limited to the issue of Deering Milliken's duty under the Act to *remedy* Darlington's unfair labor practices. No evidence was to be taken as to motivation, or as to whether a violation of the Act had occurred (R. 512; Tr. 3527). No party later excepted to the trial examiner's statement "that the remanded question of single employer status has been presented in connection with the question of remedy rather than for [a] possible finding of violation by other, if related, corporations" (R. 110; see also R. 512). Any evidence considered irrelevant to remedy, because primarily concerned with violation, was excluded.[6]

The trial examiner's report of nearly 50,000 words found that the "single employer" doctrine did not support the issuance of an order against Deering Milliken. The examiner held (R. 194):

> "Clearly (in this situation I do not hesitate to use the term) no single employer status has been shown here".

The union thereafter requested, and the Board granted, a second remand for the purpose of taking newly-discovered evidence. Examiner Buchanan held a third hearing and

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[6]For example, Deering Milliken's counsel sought to elicit from Roger Milliken a denial or explanation of a statement that he would not reopen the plant as long as a "hard core" of workers supported the union. Objection was made that this did not relate to remedy, and was sustained by the trial examiner (R. 1234-36). Yet this conversation is repeatedly emphasized, *e.g.*, in the Board's decision (R. 25) and its brief (p. 8).

concluded that the new evidence did "not affect the findings made concerning single employer status" (R. 239).

On appeal, the Board held, 3-2, that Deering Milliken, Darlington and the seventeen other mill corporations in which the Milliken family had an interest together constituted one "complex" (R. 24), a term nowhere defined but apparently a unitary enterprise in which, like a general partnership, each of the members is liable for the acts of the others. The majority held (R. 23):

> "It is now well established that for two or more legal entities to constitute a 'single employer' for purposes of assessing liability for unfair labor practices it must be shown that there was a sufficient degree of common ownership and common control of labor relations and operations so that it may be said that they are engaged in a common enterprise. In our opinion the evidence fully supports a finding that Darlington and Deering-Milliken and its affiliated corporations meet this test."

Member Leedom, dissenting, adopted "the reasons indicated by the trial examiner" with special emphasis on the "absence of common ownership within the meaning of the decided cases" (R. 34). Member Rodgers, also dissenting, similarly held that the burden of proof had not been sustained on this issue. He emphasized (R. 35) that potentiality of control is not an acceptable substitute for actual control as an ingredient of the single employer rule.

C. Darlington was Not A "Runaway Plant"

The majority of the court below declared (R. 1899-1900):

> "[The] sale [of Darlington] was concededly entire, bona fide and irrevocable. The Trial Examiner

> demonstrated beyond debate that Darlington was not a 'run-away' plant—that is, a plant having another existence in another form—finding that Darlington was not hidden among the other Milliken corporations. No disagreement with this finding was or on substantial evidence could have been, expressed by the Board."

Yet the amicus (AFL-CIO) says flatly that "The Darlington production was simply transferred to other Deering-Milliken mills" (p. 13). And the Board's brief (deserting the Board's *decision*) now says that this "may well have been" the case (p. 21; see also TWUA Br. 6).

The runaway plant claim originated with the union's 1957 offer of proof, in which it alleged that Darlington had sold a large part of its machinery and equipment to the other Deering Milliken mills (a claim later abandoned) and that its production had been absorbed by those other mills, with the result that there was "no depletion in the type or amount of fabrics available for sale by [Deering Milliken]" (R. 302). The question was examined exhaustively at the 1958 hearings, the trial examiner flatly concluding that there was no "transfer of accounts, of constructions [*i.e.*, fabrics] manufactured, or of styles to another mill when Darlington was liquidated" (R. 177).

With its closing impending in October, 1956, Darlington had to make efficient arrangements to "tail out" its production on future contracts, some running well into 1957. On some contracts, Oeland, Darlington's treasurer and chief executive officer (R. 120), was successful in persuading the customer to cancel by paying an allowance (Tr. 2835). On others, the contracts were assumed and performed by non-Deering Milliken mills. In a few instances, Darlington did turn for help to other carded print cloth mills served by Deering Milliken and several agreed to take over these contracts at Oeland's request. In one instance, the

other Deering Milliken mill exacted from Oeland a penalty of two cents per yard (R. 1212). After reviewing all these post-closing transfers, the trial examiner concluded (R. 177), "There is no basis for concluding that the transfers favored other Deering Milliken mills."

As the trial examiner noted (R. 177), if Darlington had been truly a member of a chain, the mill would have shut overnight, with unfilled orders supplied by other units in the chain. Instead, he concluded that "there is no proof that Darlington's products, in their type *or* amount, were compensated for and provided any addition to what would otherwise have been the other Deering Milliken mills' production" (R. 178).

Deering Milliken could not turn around and replace Darlington's lost production with substitute production from another cotton print mill. For example, Darlington had been producing a 109 x 58 broadcloth for a very important customer; when Darlington closed that customer took its business elsewhere; the record shows that it was at least six months before any other Deering Milliken mill would be in a position to produce this broadcloth for sale on the open market (R. 956). Moreover, the ten buyers who in 1956 were Darlington's largest customers, accounting for 55% of its production, bought through Deering Milliken in 1957 almost 9 million yards less of the fabric constructions within the general area of Darlington's products (R. 959-60). Between the same two years, there was a reduction in the number of spindles at the Deering Milliken cotton mills, and a corresponding drop in spindle activity, greater than that of the industry at large (R. 954-55). In terms of total poundage of yarns produced, the mills other than Darlington produced slightly more poundage in 1957 than in 1956, but this resulted from the installation of new high-speed equipment, and the total yarn produced by the combined

mills was still less than it had been when Darlington was in business (R. 952-54).

The examiner expressly ruled (R. 177-78), and the Board by adopting the examiner's findings (R. 4) held, that Darlington was not a runaway plant. These findings were considered and affirmed by the Court of Appeals. That court held that Darlington's demise was not provisional, its mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable (R. 1899-1900). It went on to hold that, even if the Board had disagreed (as it did not) with the examiner's finding that Darlington was not a runaway plant, that conclusion would not have been supported by substantial evidence (R. 1900). The union did not seek certiorari on this point. Thus, for this Court's purposes, this issue is irrevocably settled.

D. Deering Milliken's "Control" of its Mill Principals

1. The "Related" Mills

The Board's treatment of this subject (pp. 13-21) is headed, "The Interrelation between Darlington and the Other Deering-Milliken Plants", paralleling the treatment in its decision (R. 24-27). Elsewhere the Board had candidly admitted that the relations of the mills other than Darlington to Deering Milliken is not covered in the record.[7] While there is considerable proof in the record of the participation of Roger Milliken in the management

[7] In its brief to the Court of Appeals in *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961), the Board, appealing from a district court injunction against a *second* remand of the case to the trial examiner, explained that it needed additional facts as to the other mills because of the "paucity of the evidence on the rights and relationships served by the other mills in this complex corporate structure" (p. 6, n. 8) and because "the evidence taken at the original remand hearing was not directed to the relationship between Deering Milliken and the other textile mills besides Darlington" (p. 8, n. 10).

of the various companies of which he was president, there is virtually no evidence of either Deering Milliken's or Darlington's relations with the other mills. The Board's decision and its presentation here attempt to fill this gap by assuming that Deering Milliken's relations with the other mills were identical to its relations with Darlington.

The hearings on remand in 1958 had been confined to the Deering Milliken-Darlington relationship. The examiner had excluded all evidence bearing on the relationship between Deering Milliken and any mill corporation other than Darlington.

As the hearings were about to close, counsel for General Counsel asked counsel for Deering Milliken to stipulate that the relationships between Deering Milliken and each of the operating mill corporations (other than Darlington) were substantially the same as, or were similar to, the Deering Milliken-Darlington relationships. This request was refused on the ground that if these further relationships were to be the subject of the remand, it could not be done by stipulation but only by the presentation of specific evidence and only after the trial examiner or a court had approved the propriety and relevance of such an excursion.

As the examiner's report relates (R. 105), the General Counsel requested that the hearing be kept open for three weeks so that he might consider the advisability of "further investigation of the relations of the other companies; along with or parallel to what (he had) attempted to do here in regard to Darlington," and of a request to the Board for clarification of the scope of the remand order. No request for extension of the hearing was forthcoming and, by prior arrangement, it was closed on November 13, 1958.

2. Darlington's Independent Management

Deering Milliken has been selling textiles and factoring the accounts of textile producers for nearly 100 years (R.

579). In its New York City main offices and seven branch offices, it (and a subsidiary) employed 560 people in 1956-1958 (R. 514, 573). It was not then a manufacturing company (cf. n. 1, p. 2, *supra*). Deering Milliken sold the goods produced by the mills and factored the accounts receivable from their customers. Darlington paid Deering Milliken the standard industry print cloth commission of 2½% for these services (R. 582).[8]

One of the practices peculiar to the textile industry is that the operating head and chief executive officer of a textile manufacturing company is not the president, as in most businesses, but the treasurer (R. 583; see R. 120). The president of such a company occupies, in effect, the position of chairman of the board. This was true of Darlington: the company's by-laws provided that the treasurer was responsible for "all financial and general business of the company under supervision of the Directors" (R. 1130).

While the president of Darlington was Roger Milliken, also president of Deering Milliken, the treasurer and, as such, concededly the chief executive officer (R. 120) was James M. Oeland. Oeland held no position in Deering Milliken or in any other mill company (Tr. 76). The Board here seeks to make it appear that Roger Milliken was the principal functioning executive of Darlington and of all the other mills, retaining all "major decisions" exclusively in his hands (pp. 18-21), but the proof was to the contrary.

Oeland entered the textile industry in 1927 and remained in it for 30 years (R. 1189-90). After working at various other companies, in 1951 he was offered the treasurership of Darlington (R. 1192). He was told that he would be

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[8]The statement made by the dissenters in the Court of Appeals (R. 1904, n. 5) that Deering Milliken's service charges were "substantially less" than those of independent factoring agents is not supported by the record.

responsible for "its costs, its employment of personnel, its purchase both of raw materials and supplies and . . . its sales" (R. 1192). It was made perfectly clear that Oeland was to be "in complete charge" and that "whether or not he sought advice, the responsibility for decisions would be his own" (R. 139).

Darlington's organization chart, like that of other textile mills, showed the treasurer, not the president, at the apex of the corporate pyramid (R. 1132, 1237). While Oeland was, of course, responsible to his Board of Directors, needing approval on such matters as capital expenditures (R. 120, 1136-37), he rarely saw Roger Milliken or any of his fellow directors other than at two or three formal meetings a year (R. 1195, 1198). In countless administrative matters, he acted independently and without consultation with Roger Milliken or others. With the advice of local counsel, Oeland handled the stock records and the transfer of 500 to 1000 Darlington shares annually (R. 591, 1141, Tr. 859). He set up Darlington's bank accounts, and signed the checks. Nobody at Deering Milliken or the other mills could sign against Darlington's bank accounts (R. 1140). He changed Darlington's systems of accounts[9] to match methods he had learned years earlier at other mills (R. 590, 1194).

All the hiring and firing of employees was done by Oeland (R. 120). Neither in the handbooks issued to them, which showed him as the company's principal executive (R. 1131-32, 1237-38), nor in any other way were Darlington's employees told that they were employed by a chain. The examiner noted (R. 127), "there is no evidence

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[9]Deering Milliken's treasurer, Minot Milliken, testified that he not only did not have copies of the accounts kept by Oeland at Darlington (R. 590) but was not even acquainted with the form in which such records were kept (R. 130).

that the employees of Darlington ever considered or referred to themselves as employees of Deering Milliken or of any of the other mills or mill corporations." Even in the all-important areas of wages—for labor costs meant the difference between survival and failure for a textile mill—Oeland acted independently. In 1955, Oeland decided upon, and put into effect, a smaller increase at Darlington than was given by the other mills (R. 1204-07). Oeland and his management at Darlington had sole control over prices. The function of Deering Milliken and its salesmen was to reach a price acceptable both to the mill and the customer (R. 592). Sales were primarily to "converters," i.e., concerns which buy griege goods and "convert" them by dyeing and finishing or printing (Tr. 1509), thus preparing them for cutting and sewing. But goods never were sold without the agreement of the mill treasurer, who reserved the right to accept or reject an order (Tr. 1567), unless (rarely) a higher price than that set by the treasurer, Oeland, was obtainable (Tr. 1708).

Roger Milliken was, of course, Oeland's superior and received regular reports from him. The Board repeatedly refers to these reports as evidence of Milliken's control of Oeland. However, while Oeland regularly reported the mill's progress in all phases of its operation (e.g. R. 1824, 1829, 1836, 1840, 1843 and 1857), there is virtually no evidence that he received any instructions from Roger Milliken (or anyone else) dealing with conditions revealed by his reports. When the union moved into Darlington and began its efforts to organize the mill, Oeland, after an initial telephone call apprising Roger Milliken of the development, dealt with the situation on his own responsibility and initiative.

The functional division between Darlington and Deering Milliken is shown by Oeland's testimony (R. 1210):

> "[Deering Milliken] wanted to sell goods. That was their job. My job was to make them and sell them at a profit. . . ."

Oeland's compensation included 2 percent of the mill's net profit (Tr. 1743), which gave him an incentive to make Darlington succeed. Oeland was constantly seeing to adapt Darlington's product line to market developments—even if that meant direct competition with other Deering Milliken mills already producing those products (R. 134) and Deering Milliken and its salesmen did nothing to reduce this inter-mill competition (R. 135). As the examiner noted (*ibid.*), such product competition would not exist in an integrated, single employer operation where each "department" usually performs a particular function. Cf. *NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398, 401 (1960).

3. Deering Milliken as Sales Agent and Factor

Deering Milliken was not Darlington's parent; for example, no consolidated audited statements were ever prepared covering both Deering Milliken and Darlington (R. 1217). The relationship was a business one. Textile mills do not generally market and sell their produce. The selling function has been traditionally performed by a separate enterprise called a sales agent and factor.[10] Deering Milliken

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[10]The factor has been of special importance in the merchandising of textiles in the United States, "where he has developed into a peculiar and specialized type of commercial (and even investment) banker, whose loans are limited to the one specific field in which he is skilled." 9 Encyc. Britannica 28 (14th Ed.). "The modern factor supplies his client with information and advice not only on financial problems, but also on design or styling of product, marketing considerations, production, and sales." Phelps, The Role of Factoring in Modern Business Finance (Commercial Credit Co. 1956, quoted at R. 1812). The same work lists a number of supplemental services provided by the factor to its mill client, including credit information, market studies, management consulting, advice on machinery replacement, suggestions on taxes, pensions etc.

functioned as Darlington's exclusive sales agent and factor. The services it rendered to Darlington were similar to those rendered by competing factoring houses to their mill principals (R. 1222).

The Board found (R. 25) that Deering Milliken "exercised complete control" over the sales of all the "related" mills. This finding was so clearly devoid of support in the record that Judge Bell's dissenting opinion in the court below did not adopt it and it is not defended in the Board's brief (*cf.* p. 40).[11] To the contrary, the record shows that factors and sales agents performed identical services for mills in which they were and were not financially interested (R. 205). The Board's present claim seems to be that Deering Milliken's "control" was exerted through administrative channels, particularly through its tax and insurance departments and through affiliated service and research corporations.

Deering Milliken's Tax Department (NLRB Br. 14; TWUA Br. 24) was headed by a public accountant (C. W. Kable) with a professional staff (R. 630). Kable had been made an officer of each mill, serving without compensation, so that he would have the right to sign tax returns (R. 160, 632-33). This department provided Darlington with services not available to it internally. Oeland quite often solicited Kable's "opinion" and "advice" in these specialized

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[11] In the thousands of documents that passed between Darlington and Deering Milliken, one was found and advanced by general counsel as evidence of Deering Milliken control over production at Darlington. The sales supervisor in New York wrote Oeland that he would get "clearance" from another department of Deering Milliken so that Darlington might continue to make a certain fabric (R. 170). The trial examiner, not without some difficulty, finally concluded that this letter was an aberration, not reflecting a normal course of dealings and not probative of control over sales (R. 170-71). He might also have observed that this was the only letter of its kind, and have contrasted it with others in which Oeland rejected suggestions from New York such as that he begin producing 80-square print cloth (R. 1377).

fields and expressed warm appreciation for his help (R. 1402, 1385-94). Deering Milliken's competitors in the factoring field also gave advice to their mill principals with respect to tax matters (R. 1222). The Tax Department functioned much as an independent accounting firm with the ultimate authority over the settlement of tax matters remaining in Oeland's hands at Darlington (R. 633, 160).

Similarly, Deering Milliken's Insurance Department (NLRB Br. 15; TWUA Br. 24) supplied a cost-saving cooperative service for the mills. Each mill decided what insurance it needed, and not all purchased the same kinds (R. 677-78, 681). This arrangement enabled Darlington to obtain higher coverage than it could have separately purchased for the same cost (R. 679-80). Deering Milliken was not covered under any of these policies (*e.g.*, it had a workmen's compensation policy different from that of the mills, R. 682), with the exception of a group travel risks policy which covered executives of both Deering Milliken and the mills.

Deering Milliken Service Corporation (NLRB Br. 15; TWUA Br. 21-23, 25) was a wholly owned subsidiary of the manufacturing corporations. Each mill corporation owned one share for each of its mills (R. 118, 687). Its directors were six mill treasurers, its president (Lowry), and Roger Milliken (R. 723). It operated as a central clearing house for information and a reservoir of skilled advice and assistance from which the mills could draw as needed. In the Board's own words (p. 15), DMSC made "recommendations" to the mills; it did not order or direct, for indeed it was itself owned by the mills, and did not participate in the sales and factoring activities of Deering Milliken. The mills were not required to avail themselves of DMSC's services and could terminate their service agreements with

it at any time on proper notice (R. 118, 686). There is no evidence to support the Board's claim (R. 26) that Deering Milliken (which owned no interest in DMSC, R. 723) exercised control over DMSC, let alone over Darlington through DMSC.

One DMSC department was concerned with "placement", meaning that its job was to attract supervisory and technical trainees for the mills. The Board says (p. 16), erroneously, that prospective employees were encouraged to look upon all the corporations as a single unit; in fact they were told the contrary.[12] Similarly, the Research Corporation (p. 17) (in which Deering Milliken held a small interest) was the means by which the mills pooled their research effort; it incidentally performed the functions recited by the Board with respect to maintenance, production goals, and equipment standardization at the mills.

The trial examiner found no significance in the use of collective nouns, such as "the DM mills" or "Mills with Milliken". The latter phrase was used in an advertising brochure on which the Board lays heavy stress in its decision (R. 27) and brief (p. 18).[13] Phrases like these, despite their legal inexactness, were commonly used even at the hearings, for there was no short alternative (Tr. 1468; R. 585). Such collective phrases were common both in the industry and elsewhere. The mills were not strangers to

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[12]Revealing in this connection is a set of instructions given to interviewers to describe supervisory employment opportunities at the Deering Milliken mills (R. 1642-43): "Deering Milliken Sales Agent —28 units with 25 in South;" "Mills have kept corporate identities and operate as separate units therefore, we have advantages of large and small organization; . . . ."

[13]This brochure was prepared as a promotional piece for the trade at a New York sales meeting, to interest potential customers in the woolen, worsted and blended fabrics (not the print cloths made by Darlington) sold by Deering Milliken. Excerpts are found at R. 1336-

each other or to Deering Milliken. Where precision of reference was required, such as legal papers (R. 1229) or sales contracts (R. 1230), the exact names of the corporations were given and their independent status clearly delineated. For example, the cotton sales notes explicitly stated that they were accepted by Deering Milliken "specifically designated as a selling agent" and "acting as agent for" the particular mill whose products were being sold (R. 217, 586, 1230).

Witnesses pointed out that "Cannon Mills" was used throughout the trade to describe mills selling through Cannon (R. 1224-25), whether owned by Cannon or not, and that "AMC Stores" described a group of independent stores or agents that pooled their purchasing through an associated corporation (R. 1227). The examiner found some analogy in the Bell System companies (R. 210-14), and it was also pointed out (R. 206) that "CBS Affiliates" refers to a cluster of independent companies affiliated with the network selling their time and facilities on a national basis. The examiner observed that "interrelationship [among the mills] is shown; but not interdependence, and certainly not control" (R. 172). No matter how deeply the record is probed on the question of control, this conclusion cannot be seriously disputed.

The close cooperation that generally characterizes the relations between textile manufacturer and sales agent does not depend on the presence or absence of a common element of ownership but on the mutuality of interest and the mutual interdependence arising from the respective func-

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41, and the exhibit is discussed at length by the examiner (R. 216-18). The brochure also refers to the mills as "the mills served by Milliken" (R. 216), "associated with Deering Milliken" (R. 1341), and "new mill affiliates" (*ibid.*), and to Milliken as "one centralized buying office" (R. 217, 1339), all phrases which are inconsistent with the Board's findings.

tions they perform within the industry. The relationship between these mills, and of each with its common sales agent, is entirely different from that envisioned by the tests of vicarious liability enumerated by this Court in *NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398 (1960). Those tests are not satisfied merely by a showing that several employers sacrificed a degree of independence, each in favor of the others, out of motives of enlightened self-interest. It was not enough for the Board to determine that they pooled their efforts in the solution of mutual problems, or banded together for the common good, or even (to a very limited extent) drew from a common reservoir of management personnel.

E. Darlington's Independence in Labor Relations

Oeland testified without contradiction that he never discussed the subject of Darlington's labor relations with anyone outside the company (R. 1199-1202). The examiner found that labor relations at the various mills, even when parallel, were "independently determined" (R. 187). Yet the Board found that Deering Milliken "exercised control over the labor relations of all of the corporations, including Darlington", and that this control was exercised "primarily through the person of Roger Milliken" (R. 25). Conceding that the "details of day-to-day personnel relations may have been, of necessity, conducted at the mills" (R. 25; also NLRB Br. 27 n. 23), the Board found that "major decisions" were made by Roger Milliken, and accordingly "Deering Milliken must assume responsibility for control of Darlington's labor relations" (R. 25).

The Board's conclusions in what it aptly described (R. 24) as this "crucial area"[14] were based upon eight specific examples said to be found in the record.

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[14]Citing *Dearborn Oil & Gas Corp.*, 125 N. L. R. B. 645. The "degree of control over the labor relations" was described in one of the earliest single employer cases as "important". *NLRB* v. *Con-*

Much of the evidence is not only equivocal but negative, *e.g.*, Roger Milliken is said to have "received reports" on various topics and to have "obtained additional details" by personal visits and correspondence (NLRB Br. 19). There is no evidence that he ever did anything about these subjects; these are simply matters included in regular operating reports. Another group of instances is characterized as the making of "detailed proposals and recommendations" (*id.*, 20); these are entirely consistent with the examiner's finding (R. 121) that Milliken "could plan, urge, and exhort; [but] he did not control". His "suggestions" were only that, and the recipients (the mill managements) were free to disregard them as Oeland frequently did (R. 124) if they did not think them useful. (See, *e.g.*, R. 1010-11, 1027, 1037, 1061, 1729, 1748 and Tr. 3521.) They were, as the trial examiner observed (R. 138), "more nearly precative than authoritative" and they lend no support to the finding that Roger Milliken controlled labor relations.[15] Finally, petitioners make no claim that to the very limited extent that Roger Milliken participated in an advisory role in the management of

denser Corp., 128 F. 2d 67, 71 (3d Cir. 1942); see also *Press Co.* v. *NLRB*, 118 F. 2d 937 (D. C. Cir. 1940). In *Bachman Machine Co.* v. *NLRB*, 266 F. 2d 599, 602 (8th Cir. 1959), the court reversed the Board's single employer finding, primarily on the issue of common control of labor policies, although the president of both companies actively participated in their union negotiations and the manager of one company was required to consult the president on all labor matters. See also *Bethlehem Steel Co.* v. *NLRB*, 120 F. 2d 641 (D. C. Cir. 1941).

[15] The Board cites only one instance (p. 20) which it claims involved direction rather than recommendation by Roger Milliken. Allegedly, Milliken "directed the mills to limit the number of spare hands." (*ibid.*) The proof showed, to the contrary, that Milliken merely inquired as to the number of employees working less than 40 hours per week (R. 1740) and as to whether having such employees was a desirable practice (R. 1088). The mill treasurers had complete authority to continue their existing spare-hand policy if they so chose (R. 1089).

Darlington, he was doing so as president of Deering Milliken rather than as president of Darlington.

The Board concludes its discussion of labor relations control by claiming that Roger Milliken determined the mills' policy toward unionization (pp. 20-21). As to Darlington, however, the record showed that he only visited the mill on the three or four occasions a year when directors' meetings were held (R. 1195). In particular, Roger Milliken played no part in the company's response to the union's campaign. During the two months immediately preceding the election, he was traveling and was not even in South Carolina (R. 1092). It was Oeland, along with Darlington's local counsel, who conducted Darlington's effort to win the election (R. 1776). Occasional references were made to the topic in Oeland's weekly "newsletters" to Roger Milliken, which Oeland regarded as a type of personal diary or a means of "thinking out loud" (R. 1070, 1173); but Milliken gave Oeland no advice, let alone directions, on the matter (R. 1071-72).

Several weeks after Darlington's stockholders had voted to liquidate, Roger Milliken sent to the other mill managements for their information an article from the November 8th issue of "America's Textile Reporter" discussing the election. He cited the article as proof that Darlington "was negligent in its public relations" (R., Vol. V, 176). The recipients were urged to make sure that their mills and their problems were known and understood in their communities (R. 177). The Board found that this was "obviously intended as a primer to the managers of the mills in combatting union organization" (R. 25), and its brief (pp. 12-13) quotes copiously from the article, as if the fact of distribution made each and every word of the author Roger Milliken's. Roger Milliken denied endorsing or

agreeing with the views stated in the article (R. 974-82). Nothing in his two-paragraph memorandum of transmittal (R., Vol. V, 176-77) suggests otherwise; indeed, the only personal view he expressed therein was "I think the article is interesting" (*id.*, 176).

At the hearings, General Counsel made no attempt to establish that uniformity of wage and employment practices, and thus of labor relations, existed among Darlington and the other mills. Union counsel did attempt to show uniformity but soon abandoned his efforts when a clear and unmistakable pattern of non-uniformity emerged. The record indicates without contradiction that there was a substantial lack of uniformity among some or all of the "related" mills in the following matters:

(1) Wages paid on particular jobs (R. 1205); (2) Content of the same job at particular mills (R. 1154, 1200); (3) Job assignments (R. 722); (4) Shift hours (R. 1183, 722); (5) Three-shift operations, as applied to the same department in different mills (R. 725); (6) Rotation of shifts (R. 728); (7) Starting hours for shifts (R. 1183); (8) Shifts differentials or premiums (R. 1181); (9) Use of spare hands (R. 1088); (10) Allocation of industry-wide wage increases (R. 1205); (11) Seniority lists (R. 1182); (12) Written vacation plans (Tr. 3435); (13) Use of "sign-up sheets" for new employees (R. 1147-48); (14) Working conditions generally (R. 722); (15) Overall labor cost (R. 1233); (16) Group insurance benefits (R. 681) and (17) Salary payments to second hands (Tr. 2012). In short, the record reveals anything but the "thoroughly integrated, monolithic enterprise" (R. 1905) described by the dissenters in the Court of Appeals. The Board now concedes (p. 27 n. 23) that "labor conditions were not uniform in all the plants".

In this "crucial area", the Board concluded (R. 24; NLRB Br. 19) that Roger Milliken "exercised ultimate control over the labor relations of all the corporations". The Board's use of the qualifying word "ultimate" may properly be regarded as formal deference to the evidence because there was no proof that in fact Roger Milliken directly dictated, or prescribed the labor relations of Darlington or exercised any control over those relations. The Board made no finding that the asserted power was exercised but rested its conclusion on the ground that Roger Milliken had the power to control (see p. 18 n. 18) without regard to whether that power in fact had ever been exercised.

The record indicates that Darlington's supervisory personnel rarely, if ever, saw or talked to Roger Milliken. Shirley (spinning room overseer) had never talked to Roger Milliken about the union and was not personally acquainted with him (R. 489); Kinsey did not know Roger Milliken and had never spoken to him during his 16 years as a second hand (assistant overseer) (R. 497). Neither Cox (weave room second hand) (R. 500) nor Kinsaul (spinning room second hand) (R. 505) had ever talked to Roger Milliken. Against this background, it is not surprising that the examiner found (R. 66) that certain statements made by Darlington's supervisors did not reflect declarations of Roger Milliken.[16]

The examiner considered and rejected the very argument the Board is now making. He said (R. 203):

> "Managerial identity does not makes one company or branch liable for the violations of another or liable for remedy, but *common application* of a violative policy or practice does . . . [but] it has not been

[16]The Board did not pass on this finding (R. 7 n. 13).

> shown that Deering Milliken controlled Darlington's labor policies so as to be liable for the latter's violations; or that a joint policy existed under which any other corporation became liable." (Emphasis in original.)

No matter how broad a definition of the term the Board adopts, the record is still clear that Deering Milliken and its officers had nothing whatever to do with Darlington's "labor relations".

SUMMARY OF ARGUMENT

I

The Board's single employer doctrine, when used to support an affirmative order against a company which did not commit or participate in a statutory violation, can only be applied on a showing that the companies involved were "paper" corporations commonly owned by an individual or a small group. The substantial non-Milliken ownership of Darlington, and its long history as a separate and self-contained corporate entity, prevent the assertion against its stockholders, Milliken or otherwise, of liability to remedy its alleged unfair labor practices.

N. L. R. B. v. *Deena Artware, Inc.*, 361 U. S. 398 (1960), teaches that shareholders are normally insulated from the debts and obligations of the corporation. It is only when the several companies are established and operated as "largely paper arrangements that do not reflect the business realities" (*id.*, at 403) that the staggering liability assessed in this case against the owners of the enterprise can be justified.

Darlington was not a subsidiary of Deering Milliken; this was not a complicated corporate maze constructed for the purpose of minimizing enterprise liability, or of frustrat-

ing efforts to trace assets and obligations. The Milliken family ownership of Deering Milliken, Darlington and the other related corporations, even if it carried with it the potentiality of common control, was insufficiently concentrated and dominating to establish the common liability of all the companies so owned.

II.

The Board has failed to bring this case within the theory of the runaway plant cases, and has failed to find that anywhere within the so-called Deering Milliken "complex" there was merely a "disguised continuance" of Darlington. *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 106 (1942).

Thus, even if Deering Milliken is bracketed with Darlington under the single employer theory and is regarded as the "employer" of the Darlington workers, it did not violate the Act by permanently closing a plant.

The Court of Appeals correctly held that a multi-plant employer had the right to close down a plant, for any reason, as long as "an actual, unfeigned and permanent end of operations" had occurred (R. 1899). The multi-plant employer is in this regard on the same footing and governed by the same rules as the company owning and liquidating a single plant.

III

The union urges (1) that Darlington's shareholders be required to reconstitute and operate a cotton print cloth mill in Darlington, South Carolina and (2) that the Board erred in dismissing the complaint against Roger Milliken in his personal capacity. All eleven persons who have passed upon these contentions have rejected them. We agree with the Board (p. 3 n. 2) that neither contention is meritorious.

POINT I

THE COMMON OWNERSHIP SHOWN ON THIS RECORD IS INSUFFICIENT TO SUPPORT THE BOARD'S ORDER AGAINST DEERING MILLIKEN

The Board in its brief in this Court (p. 2) states that the question presented is whether an employer "which operates a number of separate plants under common control" commits an unfair labor practice by closing one of the plants to avoid collective bargaining and in reprisal against the choice of the employees in the plant to be represented by a union. In its petition (p. 2) the Board had said that the question was whether an employer "who owns several plants" violates the Act by such a closing. This change in the manner of stating the question can only be a studied departure and not simple carelessness in drafting.

Common ownership is an essential element in the Board's single employer doctrine both by its own decisions and the decisions of courts reviewing its orders.[17] In its decision the Board cited many of these cases and stressed that common

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[17] In *Dearborn Oil and Gas Corp.*, 125 N. L. R. B. 645, the Board reversed its trial examiner's conclusion that three corporations must be considered as a single employer for purposes of assessing responsibility for an unfair labor practice committed by one of them. The majority found no common control of operations or labor relations, but went on to say that, even if it had found such control, that would not establish the corporations as a single employer. It continued (at 647):

> "Generally speaking, in those unfair labor practice cases in which the Board and the courts have held that a legal entity may be held for the acts of another, because both constituted a single employer, it appeared that both were not only subject to common control, but also that a controlling ownership interest in both companies was held by the same individual or group of individuals. We believe that it is proper to require that both elements—common ownership and common control—coexist before we assess joint responsibility."

See also cases cited notes 19-21, *infra*.

ownership was "necessary" and "must be shown" before its single employer doctrine became applicable (R. 23-24). If the Board's theory on appeal is that common control is something less than common ownership and will suffice to make a single employer of several corporations, the theory is different from the Board's theory in arriving at its decision. That decision cannot be sustained on the basis of some other and different finding that might have been made but was not, even though that finding might have justified its ultimate conclusion. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943) Therefore we assume in this part of our argument that the Board will attempt (as it did in its petition) to sustain its decision as written, and we shall show that there was not as among Deering Milliken, Darlington and the other corporations thought to be related to Deering Milliken the kind of common ownership that has always been considered essential to the Board's single employer concept.

The court below did not reach the question of whether "single employer" status existed, since it decided the case on other grounds (R. 1901-02). Until this case, the Board's "single employer" concept[18] has been based upon a finding of three factors common to the corporations said to constitute the unitary enterprise: ownership, control of operations and control of labor relations. The last two of these make up the bulk of the present record and, as to them, this respondent contends that the proper course would be to

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[18]NLRB "single employer" determinations are not entitled to judicial deference for Board "expertise". While the Board is an agency "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect", *Universal Camera* v. *NLRB*, 340 U. S. 474, 480. (1950), a determination that one corporation is controlled by another does not fall within that area of special skill. Courts have not hesitated in this area to exercise their function of "assuring that the Board keeps within reasonable bounds." (*id.*, at 490).

allow the Court of Appeals to review the Board's findings thereon.

Ownership, however, is in a separate category. The facts are simple, were stipulated and set forth in a single document (Ex. A-12, R. 1308-11). Here is a pure question of law ripe for decision by this Court: whether common ownership of the alleged unitary enterprise is essential to a finding of joint and several liability of the units comprising the enterprise, and, if so, whether the ownership shown on this record is sufficient to warrant the extension of Darlington's liability to Deering Milliken.

This respondent contends that, as a matter of law, there was not sufficient common ownership between Darlington and Deering Milliken to permit the conclusion that those two separate corporate entities constituted a single employer. However, if this Court finds that a lack of common ownership is not enough to preclude the application of the single employer doctrine, then the only proper course would be to send the entire question of the existence or non-existence of single employer status back to the Court of Appeals to allow it to perform its statutory function of reviewing NLRB evidentiary determinations. *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408 (1962); *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502-03 (1951); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490-91 (1951) It is significant that the NLRB, despite a long factual discussion (pp. 13-21), does not present any single employer argument. Indeed, in its petition for certiorari, the Board conceded that the single employer issue "would appear to be open on remand" (p. 10 n. 6a).

A. The Cases Require Greater Common Ownership Than Is Here Present

The cases cited, *infra*, show that not any degree of ownership by a common source will suffice to meet this por-

tion of the single employer test; that test is satisfied only where a subsidiary is wholly owned by a parent, or where virtually all the shares of the separate corporations are held by a small group of owners.

The Board majority, reciting (R. 23) Milliken ownership of 66 percent of Darlington's shares and a majority (ranging from 55 percent to 88 percent) of the "affiliated" corporations, has found (R. 24):

> "Such stock ownership clearly satisfies the Board's requirements for a finding of 'common ownership.'"

Actually, neither Board nor court of appeals decisions discussing this question have ever assessed vicarious liability in a single employer case where the ownership interests commonly held were as diverse and diluted as here.

As Member Leedom, dissenting, noted, "there is here an absence of common ownership within the meaning of the decided cases" (R. 34). The other dissenter, Member Rodgers, noted that the fact of "single ownership" is "open to serious question" on this record (R. 35). A study of the voluminous cases, both before the Board and the courts, in which ownership is discussed reveals how far the Board majority has departed from precedent in finding that this requirement is "clearly" satisfied.

1. The Aggregate Holdings in the Commonly Owned Entities Must Closely Approximate 100%

The Board cases have assessed joint unfair labor practice responsibility against multiple entities only where the common ownership interest therein amounted to 100% or something very close to it.[19] This is true whether the re-

[19] *E.g., Mueller Industries Inc.*, 132 N. L. R. B. 469 (1 principal stockholder in both companies); *Royal Oak Tool & Mach. Co.*, 132 N. L. R. B. 1361, enf'd 320 F. 2d 277 (6th Cir. 1963) (3 persons);

lationship is a parent-subsidiary or an owner or owners holding shares in several corporations.[20]

By contrast, the Board (R. 23) could trace only 66% of Darlington's stock to a common ownership source. (Even that must be further reduced because the Cotwool holdings in Darlington must be included to bring the

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Lexington Elec. Prods. Co., 124 N. L. R. B. 1400, mod. 283 F. 2d 54 (3d Cir.) (sole owner of primary employer owned other company with another person); *Morelli Bros.*, 123 N. L. R. B. 635 (two partners owned 100% of corp.); *Teamsters Union (Polar Water Co.)*, 120 N. L. R. B. 155 (apparently identical ownership); *Danspur Co.*, 114 N. L. R. B. 40 (one man owned 100% plus 65% of other, associates owned rest); *National Electronic Mfg. Corp.*, 113 N. L. R. B. 620 ("substantially identical ownership"); *A. M. Andrews Co.*, 112 N. L. R. B. 626, *enf'd* 236 F. 2d 44 (9th Cir. 1956) (identical 100% ownership); *Price Valley Lumber Co.*, 106 N. L. R. B. 26 (identical 100% ownership); *Ozark Dam Constructors*, 99 N. L. R. B. 1031, *enf. den.* v: *secondary employer* 203 F. 2d 139 (8th Cir. 1953) (identical 100% ownership); *Somerset Classics, Inc.*, 90 N. L. R. B. 1676, *enf.* 193 F. 2d 613 (2d Cir.), *cert. denied* 344 U. S. 816 (1952) (100% ownership).

[20]No decision has visited single employer responsibility upon a parent owning less than 100% of the stock in the corporation which has engaged in the unfair practices, provided that the parent has not directly participated in those practices. *E.g., United Fruit Co.*, 134 N. L. R. B. 287, rev'd sub nom. *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963); *Lykes Bros. Inc.*, 128 N. L. R. B. 606; *Industrial Fabricating Inc.*, 119 N. L. R. B. 162, enf. 272 F. 2d 184 (6th Cir. 1959); *Winn & Lovett Grocery Co.*, 115 N. L. R. B. 1676; *Libby-Owens-Ford Glass Co.*, 115 N. L. R. B. 1452, *enf'd* 241 F. 2d 831 (4th Cir. 1957); *A. E. Nettleton Co.*, 108 N. L. R. B. 1670 (1954), *enf'd* 241 F. 2d 130 (2d Cir. 1957). In *Renton News Record*, 136 N. L. R. B. 1294, where two companies owned 58% of the stock, the Board specifically noted "lack of sufficient common ownership" as a ground for refusing to find *alter ego* liability.

Of course, a finding based on less than 100% common ownership that two corporations constitute a single employer for purposes of determining the existence of NLRB jurisdiction [e.g. *NLRB* v. *McCatron*, 216 F. 2d 212 (9th Cir. 1954)] or to establish the extent of a bargaining unit [*e.g. NLRB* v. *A. K. Allen Co.*, 252 F. 2d 37 (2d Cir. 1958)] is not comparable to such a determination made for purposes of holding one corporation responsible for another's unfair labor practices.

figure over 50%, and neither Deering Milliken nor Cotwool was wholly owned by the Milliken family (R. 1308-09)). With almost one out of three Darlington shares held by an "outsider," there can be no rational basis for finding that the common ownership requirement was satisfied.

2. The Milliken Family Is Too Large a Group To Serve As a Source of Ownership

In prior cases which have involved a "group" ownership interest in two or more corporations, the group has been small and tightly-knit. Thus, in *Somerset Classics, Inc.*, 90 N. L. R. B. 1676, *enf'd* 193 F. 2d 613 (2d Cir. 1952), the "family" which owned 100% of all the corporations involved was a small unit, possibly five or six persons. Here we have a much larger group numbering over twenty persons (p. 4 n. 3), reaching into two or more generations. Moreover, different branches of the family owned varying interests in the several corporations (e.g. one branch owned shares in Deering Milliken but not in Cotwool), and this created an imbalance of ownership, sometimes leading to conflicts between the two interests (R. 1239o-1239p, 1239u).

Even if it is permissible to aggregate the holdings of the Milliken family, no prior Board case has assessed joint responsibility where ownership, much less partial ownership, was scattered over so large a group.[21]

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[21]Cases illustrating the tightly-knit groups against whom joint responsibility has been assessed are *Aluminum Tubular Corp.*, 130 N. L. R. B. 1306, *enf. den.* v. *secondary employer*, 299 F. 2d 595 (2d Cir. 1962) (2 persons owned 100% of one, 51% of other); *Carol Management Corp.*, 133 N. L. R. B. 1126 (single owner); *Field Paper Box Co.*, 130 N. L. R. B. 22 (2 persons); *Minnesota Mfg. Co.*, 132 N. L. R. B. 1398 (husband, wife, two children); *Morelli Bros.*, 123 N. L. R. B. 635 (2 persons); *A. M. Andrews Co.*, 112 N. L. R. B. 626, enf'd 236 F. 2d 44 (9th Cir. 1956) (4 persons); *Milco Undergarment Co.*, 106 N. L. R. B. 767 (president's immediate family).

B. The Board's Single Employer Finding Conflicts with this Court's Guidelines in *Deena Artware*

Judge Bell, dissenting below, characterized Darlington and the other mills as "largely paper corporations", and their relationships among themselves, as well as to Deering Milliken, as merely "paper arrangements" (R. 1905-06).

The latter phrase comes from Mr. Justice Douglas' opinion in *NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398, 403 (1960). This is, so far as we are aware, the only case in which the Board's single employer doctrine has come before this Court for review. While it arose at the enforcement level (the Board had failed to collect back pay from the primary employer because it had transferred its assets to its parent after the Board's order), the case presented the same doctrine of entity liability that is subsumed by the Board's present question.

Deena Artware was one of four wholly-owned subsidiaries of Deena Products, in turn wholly-owned by Weiner. The directors and officers of all five corporations were Weiner, his wife, his son and his secretary. The Board alleged that Weiner had siphoned off all of Artware's assets to his other corporations in order to avoid the back pay order against Artware. It sought to demonstrate that Products and the surviving subsidiaries were alter egos, successors and assigns of Artware, and, hence, chargeable with the latter's back pay obligations. The Board described these companies as "a single integrated enterprise engaged in the same business, with each corporation performing a particular function as a department or division of the enterprise" (NLRB Sup. Ct. Br. 30). The case was presented, in short, as one involving the application of the Board's single employer doctrine.

But this Court did not decide the case on that basis. It held that the Board was entitled to the opportunity to

demonstrate that "the corporations under Weiner's ownership were only departments or divisions of a single enterprise" (361 U. S., at 402), but it carefully spelled out that the basis for such liability would be common law principles enabling a parent to be held liable for a subsidiary's tort or contract breach. Mr. Justice Douglas noted that "The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception" (*id.*, at 402-03) and listed "some, though by no means all, of the relevant considerations" to be examined before the exception is applied: the corporate forms being "largely paper arrangements that do not reflect the business realities"; one company being operated as a division of another, or an inadequately financed shell; the several companies being represented as one; their affairs so intermingled that distinct corporate lines are blurred (*id.*, at 403). The only cases cited by this Court were traditional corporate-veil cases, none involving the Board.

The ownership pattern shows that Darlington, with nearly one-third of its shares in the hands of public holders, was not operated as a subsidiary, and certainly not as a division. Nor was Deering Milliken merely a holding company surrounded by a cluster of wholly owned subsidiaries in reality only divisions of the main enterprise. Though Deering Milliken was organized in 1865 and Darlington in 1883, it was not until Darlington's bankruptcy in 1937 that Deering Milliken, then Darlington's largest creditor, acquired any Darlington stock (R. 1896). The examiner expressly found that Darlington had not been organized, maintained or dissolved as part of a "scheme to evade" the obligations of the NLRA or any other statute (R. 92). The degree of single ownership of these respondents, in the hands of a diffuse group having varying interests in different parts of the whole, and with substantial blocs of outside

owners entitled to protection, is not sufficient to support the imposition of entity liability upon the whole for the violations of the Act by any part of the whole.

We have searched in vain for a decision by this or any other court sanctioning the disregard of corporate entities so as to allow the imposition of pecuniary liability upon a minority stockholder of the offending corporation in the absence of such direct participation in the violation by the stockholder as to make it jointly and severally liable. Nor have we found any statute where Congress has authorized collection from the stockholder on similar facts.[22] The Board's decision is unique in the field of corporate law.

POINT II

AN EMPLOYER OWNING SEVERAL PLANTS DOES NOT VIOLATE THE ACT BY PERMANENTLY CLOSING ONE AS LONG AS NO DISGUISED CONTINUANCE EXISTS

The Court of Appeals held that the owners of a business enterprise have the right to terminate that enterprise, and to go out of business completely and permanently, for any

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[22] On the instant facts, Deering Milliken would not be liable for social security payments for work done at Darlington [See Soc. Sec. Regs. §§ 31.3111-4 and 31.3121(d)-2] or any Darlington state or federal unemployment tax payments [See 1A CCH Unemployment Insurance Rep. 4280, ¶ 1311]. Also, even if Darlington were a wholly-owned subsidiary of Deering Milliken (definitely an *a fortiori* situation), Deering Milliken would not be liable for any Darlington income tax delinquencies [*National Carbide Corp.* v. *Commissioner*, 336 U. S. 422 (1949) and *Freedman* v. *United States*, 157 F. Supp. 613 (E. D. Ohio 1958), aff'd 266 F. 2d 291 (6th Cir. 1959)] or anti-trust or trade violations [*National Lead Co.* v. *FTC*, 227 F. 2d 825 (7th Cir. 1955), rev'd on other grds. 352 U. S. 419 (1957); *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D. Minn. 1959), aff'd 289 F. 2d 418 (8th Cir. 1961)], and service of process on Darlington would not be proper service on Deering Milliken. *Technograph Printed Circuits, Ltd.* v. *Epsco Inc.*, 224 F. Supp. 260 (E. D. Pa. 1963).

reason they see fit including unwillingness to deal with a labor union. On the basis of the language of the Act, its legislative history, the decided cases, and the congressional policy underlying both the Act and governmental regulation of business activity generally, this argument is correct and the holding of the Court of Appeals should be affirmed. We assume that Darlington will discuss this argument in its brief and shall not repeat that discussion here.

The principal ground of the Board's decision was that even if Darlington is considered by itself as a separate entity, it violated the Act by dissolving itself and completely liquidating its affairs. As an alternative ground for its decision, the Board held that Darlington and Deering Milliken and the other textile companies in which members of the Milliken family held stock interests should be regarded as a single employer and that for this reason the liquidation of Darlington was the closing by an employer of one of several plants and so an unfair labor practice. In this Court, the Board does not attempt to defend the first ground of its decision (see pp. 3 n. 2, 39-43). Instead, it seeks to justify its decision on the alternative ground and argues (pp. 2-3) that this case should be regarded as if the owner of several mills had permanently closed one of those mills for anti-union reasons.

Even if it is assumed that in this case there is a unitary owner of several mills and that the liquidation of Darlington represents the closing of only one of those mills, the Board's legal argument is unsound. The argument ignores the fact that the closing of Darlington was the liquidation of a separate, self-sustaining economic enterprise. Contrary to the Board's suggestion (pp. 33-34), no analogy can be drawn between this case and the situation that exists when an employer discharges employees for union activity but continues to have their work performed by other employees.

In this case there was a permanent closing and the work that was formerly done by the employees of Darlington was not thereafter performed by any other employees of the asserted single employer. We submit that when a single employer owning several plants liquidates one of those plants and there is no transfer of its operations to a new site or to one of the remaining plants, such a liquidation is entitled, without regard to whether other plants continue in operation, to that protection which derives from the right of an individual or a corporation to engage or to refrain from engaging in business for whatever reasons he or it sees fit.

We have demonstrated *supra* at pp. 8-11 that Darlington was not a runaway plant in any "sense" (AFL-CIO Br. 12-13) and no matter what "may well have been" conceivable (NLRB Br. 39-40). But this did not deter the Board. It proceeded to assess responsibility for Darlington's alleged unfair labor practices against Deering Milliken and "related" corporations because what it considered the employer entity "remained in business at other mills with other employees" (NLRB Br. 29).

Therefore, even though Darlington was, as the Board concedes (p. 48), "a more-or-less self-contained unit" and even though the business formerly done by Darlington was thrown upon the open market and could thereafter be obtained by other textile companies, whether affiliated with the Milliken family or not, only by competition in that market, the Act was allegedly violated because Deering Milliken and the related corporations "still exist" (R. 27). When Darlington went out of business its management was dispersed, its assets sold, and most of the proceeds thereof distributed as a liquidating dividend to the shareholders. To hold that the legal effect of Darlington's liquidation is transformed because some of the same share-

holders had other capital invested in other textile companies is to make this case turn on an irrelevancy. Capital investments in other companies can only be material because they enhance the possibility of a disguised continuance of the liquidated corporation. In this case, since the examiner, Board and Court of Appeals all held that no continuance of any type, disguised or not, did occur, these other investments became totally irrelevant.

We contend that it is not and should not be a statutory violation for a multi-plant employer to completely and permanently liquidate one plant unless there has been what this Court has called a "disguised continuance" of the old employer. *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 106 (1942). In the instant case, the examiner found (R. 99) that "the evidence submitted does not show that [Darlington] has been continued under a different name to permit violators to escape a remedial order while reaping the benefits of the business." In short, once it determined that the liquidation of Darlington was complete, involving the withdrawal of the capital invested therein and the total abandonment of the attempt to make a profit therefrom, the Board should have ceased its inquiry.

The permanent closing of a plant and the liquidation of the corporation owning it are intrinsically different from any situation that has been held an unfair labor practice. The Board relied on *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4th Cir. 1953) as "a case very similar on its facts to the instant case" (R. 15-16). That case involved only the temporary cessation of mining operations, as the court which decided it subsequently made plain.[23]

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[23] In the present case, like *Norma* decided by the Fourth Circuit, both the majority (R. 1899) and the dissent (R. 1910) distinguished *Norma* as involving only a "temporary intermission". Even the AFL-CIO admits that the *Norma* shutdown was temporary (pp. 7, 9).

The permanence test has been applied on many occasions and is the factor that differentiates this case from those relied on by the Board and the union in their briefs. For example, in *NLRB* v. *Preston Feed Co.*, 309 F. 2d 347 (4th Cir. 1962), a case the dissenters in the court below considered "controlling on the legal issue here" (R. 1910), a corporation, hearing that a movement to organize the drivers at one of its plants had begun, "contracted out" those jobs to another corporation under the same management and control. In *NLRB* v. *Hugh Major*, 296 F. 2d 466 (7th Cir. 1961), an individual owner, shortly after a union election victory, discharged all his employees and transferred all his trucking equipment to a family corporation that he owned.

The Board (pp. 25, 38-39) places heavy reliance on *NLRB* v. *Missouri Transit Co.*, 250 F. 2d 261 (8th Cir. 1957) and *NLRB* v. *Savoy Laundry Inc.*, 327 F. 2d 370 (2d Cir. 1964). Actually, neither case involved a total and irrevocable discontinuance. In *Missouri Transit*, an employer operating several interstate lines and a twelve-mile intrastate shuttle bus service discontinued the latter. The interstate service that remained also operated over the route between Fort Leonard Wood and Waynesville. Therefore, the discontinuance of the shuttle division only resulted in a diminishing of the frequency of bus service between those two points. More significantly, there was nothing to prevent the company from increasing the number of buses on its interstate service thereby restoring the Leonard Wood-Waynesville service to approximately its pre-closing status.

The Board's reliance on *Savoy Laundry* is particularly misplaced. That company supplied laundry service to retail, wholesale and institutional customers. But, the record indicated that it did not discontinue its wholesale division

at all. It retained three of its wholesale customers (137 N. L. R. B. 306, 317) and there was nothing to prevent it from soliciting business from other wholesalers at any time.

The liquidation of a part of a business, involving the withdrawal of the capital investment in that part and the surrender of the employer's struggle for business and financial success, should be subject to the same standards as those applicable to the complete liquidation of a business. It is highly significant that no case involving a complete and permanent liquidation of *all* business operations has ever held that the closing violated the NLRA. See *NLRB* v. *New England Web, Inc.*, 309 F. 2d 696 (1st Cir. 1962); *NLRB* v. *Neiderman (Star Baby)*, 334 F. 2d 601 (2d Cir. 1964); *Mount Hope Finishing Co.* v. *NLRB*, 211 F. 2d 365 (4th Cir. 1954). The Board has acknowledged the validity of these cases by not seeking to defend before this Court its ruling (R. 16-18) that Darlington, considered by itself, violated the Act by closing and liquidating its only plant.

These courts, unlike the Board herein, have correctly perceived that a permanent closing is different from any temporary shutdown, or transfer of work or other devices such as appear in the cases relied upon by petitioners, by reason of permanence. As the Court of Appeals held here (R. 1901), a unique situation is presented by "the extinguishment altogether of [part of or all of] the business and the end of further participation by the employer in his former sphere. The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business". The Board's statement of the issue as whether a "part" of a business may be discontinued with impunity represents a confusion between basically different things. One is a reshuffling, the other is a liquidation.

The identical considerations which should lead this Court to hold that an entire business may be liquidated, regardless of motive, require the same result when the closing of one of several plants is bona fide, complete and permanent, not involving any artifice to retain the benefit of the plant without the burden of unionization. The necessity of this result can be demonstrated by turning around an argument made by the Board in its decision (R. 17). By hypothesis all of the 28 "Deering Milliken" mills could be closed with impunity. If the shareholders chose to liquidate only 27 of them, keeping the small remainder of their investment in the textile industry, the Board would argue that only "part" of the business had been liquidated and the 27 closings were rendered illegal by the failure to effect a 28th —an absurd result.

In sum, where there has been a disguised continuance as in *Preston Feed*, or the continuation of the same activity, though on a lesser scale, with the power to resume the previous arrangement at any time, as in *Missouri Transit* and *Savoy Laundry*, there does exist a basis for assessing the employer entity with NLRA liability. He is trying to operate his business under another form. No employer should be allowed to escape a union in this fashion. The price of remaining in business and continuing to pursue profit through that business is the fulfillment of statutory obligations with respect to that business. An employer should not be penalized when it decides to accept what the examiner termed (R. 99) "the loss of profits and of that hope for future profits which motivated the enterprise." The Board has ignored the fundamental difference between the continuance of the effort to make a profit in a certain business pursuit and the complete and utter surrender of this effort. Economic suicide is necessarily different in kind and not merely in degree from a temporary closing or a plant or

product transfer. The Board's failure to recognize[24] this fundamental principle in this case should not be condoned by this Court.

POINT III

THE BOARD WAS CORRECT IN NOT ORDERING RESUMPTION OF THE DARLINGTON FACILITY AND IN AFFIRMING THE EXAMINER'S DISMISSAL OF THE COMPLAINT AGAINST ROGER MILLIKEN PERSONALLY

(A) Resumption of Operations

The union (pp. 3, 30-43) attacks the Board's order herein on the ground that it was error for the Board to refuse to order Darlington to resume operations. There is no merit in this contention.[25]

The Board has ruled that it will not order resumption if there has been a "total cessation of operations and the sale and disposition of . . . physical properties." *Royal Plating & Polishing Co.*, 148 N. L. R. B. No. 59, 57 L. R. R. M. 1006, 1008 (August 27, 1964). Therefore, in all five instances where the corporation totally and permanently retired from all business activity, it did not order the resumption of operations. *Royal Plating & Polishing Co., supra; Star Baby Co.*, 140 N. L. R. B. 678 (1963), enf'd as mod. sub nom. *NLRB* v. *Neiderman*, 334 F. 2d 601 (2d Cir. 1964); *New England Web, Inc.*, 135 N. L. R. B. 1019, enf. den. 309 F. 2d 696 (1st Cir. 1962); *Mount Hope Fin-*

[24]The Board reveals its one-sided viewpoint when it says (p. 34) that a total and permanent closing and an individual discharge "may differ slightly in [their] impact upon the employer."

[25]This contention was not passed on by the court below. If the judgment of the court below is affirmed, the contention is moot. If the judgment below is reversed, we submit that this contention of the union, together with any contentions made with respect to the propriety of the Board's order, should be initially considered on remand by the Court of Appeals.

ishing Co., 106 N. L. R. B. 480, enf. den. 211 F. 2d 365 (4th Cir. 1954) and the instant case. Furthermore, the courts that have considered the question have all agreed that re-opening cannot be ordered where there has been a complete bona fide discontinuance. *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 106 (1942); *NLRB* v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 914 (8th Cir. 1954); *NLRB* v. *Caroline Mills*, 167 F. 2d 212, 214 (5th Cir. 1948).

Darlington did not merely make "administrative alterations in [its] organizational structure" *Bonnie Lass Knitting Mills*, 126 N. L. R. B. 1396, 1398. It committed economic suicide. In such situations the Board does not and cannot order resumption of operations.[26]

(B) Dismissing as to Roger Milliken Individually

The union's question 4 (p. 3) argues that the Board erred in not holding Roger Milliken individually liable for Darlington's alleged unfair labor practices. Its arguments have been made and rejected before. The trial examiner found no evidence that Roger Milliken had individually engaged in any unfair labor practices (R. 99) or had sought refuge from statutory responsibility behind any corporate entity (R. 92). The examiner also ruled (*ibid.*, see also R. 89) that both NLRA and corporate law principles required that "Roger Milliken, President" be construed as a reference to him in that capacity alone. Finally, the examiner emphasized (R. 90) that he had interpreted the charge in that fashion early in the proceedings and well within 10(b)'s six-month limitation, without evoking any protest from the union. Furthermore, all five Board members (R.

[26]Of course, as the court below recognized (R. 1899), a resumption order would raise serious constitutional problems. We understand these will be discussed by Darlington.

29-30) and all five circuit judges (R. 1902) agreed that the complaint against Roger Milliken personally was properly dismissed. We agree with the Board (p. 48 n. 44) that there is no merit to this contention.

CONCLUSION

For the foregoing reasons, the order of the Court below should be affirmed.

Respectfully submitted,

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